BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

MICHIGAN BELL TELEPHONE COMPANY, AND AT&T SERVICES, INC. Respondents and LOCAL 4034, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO Charging Party	CASE NOS. 07-CA-161545; 07-CA-165384; 07-CA-166130; 07-CA-170664; 07-CA-176618; 07-CA-177201; 07-CA-182490; 07-CA-184669; 07-CA-190631

BRIEF OF THE CHARGING PARTY UNION

I. INTRODUCTION

A. Proceedings

Beginning on or about October 6, 2015, Union began filing charges against ATT as a result of its efforts to curb the effectiveness of the charging party in representing the employees in the bargaining unit at ATT. Various amendments and additional charges were filed as the ATT's campaign against Local 4034 and union representative Brian Hooker unfolded. Eventually, twenty-two charges and amendments were consolidated in to the Second Amended Consolidated Complaint dated February 27, 2017. ATT filed a thirteen-page Response listing fifteen affirmative defenses on August 14, 2017. A hearing was conducted before the Honorable Ira Sandron, Administrative Law Judge, that

spanned thirteen days beginning August 15, 2017 and ending on Friday, December 15, 2017 at 7:05 p.m. (Transcript, pages 1 and 2761; hereafter "T-___").

B. Background

1. A Decades-Old Relationship

For nearly 75 years, the Communication Workers of America have represented employees at Michigan Bell Telephone Company in its varied corporate forms and combinations. It appears AT&T Services, Inc. is the most recent iteration. For convenience, the employer will sometimes be referred to as simply the "company" or "ATT."

CWA Local 4034, the charging party here, has represented employees of ATT in West Michigan, as well as employees at several other employers in the communications industry, for decades. Of course, ATT is by far the largest employer. Over the course of the last decade or so, Local 4034's jurisdiction has extended eastward as ATT shed employees and the International Union consolidated smaller local unions in to Local 4034. (T-74-5).

This Local has historically been unique. Each Local can establish its own dues level, so long as it meets the minimum in the International Constitution, 2.25 hours of pay per month. The ability to afford an administrative assistant (or several as it had at one time) taken out of the employer's workload full time would be dependent on the dues its members approve. While most CWA Locals charge the minimum 2.25 hours per month

in dues, it is notable that the members of this Local have voted in higher dues and pay 3 hours per month to the Local Union. (See page 2, Box 21 (a), 2014-2015 LM-2 for CWA Local 4034, Respondent Exhibit 73). This helps pay for the enhanced representation the Local provides.

2. <u>Company Paid and Union Paid Time</u>

As has been typical under the long-term collective bargaining relationship between ATT and the CWA, and at many other large employers that have long term barging relationships with the unions that represent their employees (GM and the UAW come to mind), the current contract provides for the availability of certain company paid time for Union officials to enforce the collective bargaining agreement, as well as Union paid leave time, both long term and periodic, for negotiating and enforcing the contract.

As described in more detail below, here that paid release time is broken into two components. Some is paid by the employer under Section 10.05, under the heading "Payment for Joint Time" (Contract, GC-2, page 14), and some is paid by the Union under Section 10.08, under the heading "Absence for Union Business." Company paid time under 10.05 is coded "**MMVX"** and Union paid time under 10.08 is designated "**MMUX."** It is not unusual for a union representative to be excused full-time from the work schedule (the "load") as between company paid time and Union paid time they are essentially working full-time for the Union. Under George Mrla's jurisdiction alone, which involves I & R department employees only in some 15 locals, 10 are off the load

(excused) fulltime (T-2563 and 2636).

It is these Sections (10.05 and 10.08) that are most at issue here as a result of a new and unsupported interpretation by middle management in the "I & R" Department. The change was that, going forward, Sections 10.05 and 10.08, so far as being excused full-time from the work schedule, would apply only to elected "Officers" and no one else, a claim that is distinctly at odds with the words printed on the page.

3. CWA Local 4034 Administrative Assistants

The President of CWA Local 4034 is Ryan Letts. He took office in 2010 after serving from 2003 to 2010 as the full time Administrative Assistant (AA) for the former long-time Local Union President Jay Egan, a position for which he was granted full time leave (excused full-time from the work schedule) and received full-time pay between the relative contributions by Union and ATT under Sections 10.05 and 10.08 (T-73), as had his predecessors for many years before him (T-82). After he became President of the Local upon Mr. Egan's retirement, Letts hired Brian Hooker to be his AA. Just as with Mr. Letts before him, from 2010 to late 2015, Mr. Hooker was excused from the "load" full-time with no objection from ATT. Also, like Letts and his predecessors, Mr. Hooker was paid through a combination of company paid time and union paid time under Sections10.05 and 10.08. (T-85, 129)

President Letts explained the usefulness of an Administrative Assistant. Because it is an appointed position the reports directly to the president, the Administrative Assistant

position is less subject to any political winds that might be blowing within the local. The Administrative Assistant is intended to be free of such pressures in order to independently arrive at conclusions and to map out appropriate courses of action. This, of course, makes the AA less subject to employer manipulation through pressure it could bring upon the its workers. (T-107-109). It is likely than most employers would not welcome the presence of an individual free from such pressures.

4. <u>Requests For Information and the Need to Reduce The Time Available to Mr. Hooker to Make Them</u>

ATT is a large and complicated company. It uses technology extensively to provide services to its customers. By its very nature, the technology it utilizes generates and stores significant amounts of data related to those operations. That data, in turn, contains a wealth of information that may be important to the enforcement of the negotiated provisions of the collective bargaining agreement.

Soon after coming to office, President Ryan Letts realized the need to sophisticatedly analyze that company data to ensure that the members of the bargaining unit were not deprived of their rights under the collective bargaining agreement or worker safety laws. He was acquainted with an ATT employee, Brian Hooker, who had obtained a good understanding of the data available from ATT that may be useful in protecting employee's rights under the contract. He designated Brian Hooker to fill his former position as an Administrative Assistant for the purpose of enhancing the Union's ability

to deal with this technology giant and the ever-changing nature of its business and information capabilities.

It was also a time of stress for the workers. As noted in its opening statement, ATT has been shedding employees at an alarming rate. For example, it has reduced the number of TFS field techs in Grand Rapids alone from 38 in 2010 to 16 or so in 2015. (T-55). This was not due to an increase in the number of designated union officials under Section 10.05 (ATT didn't even argue this), but due to layoffs by ATT.

Brian Hooker immediately went to work. He had been trained on the value of requests to ATT for relevant data. This relevant data could be used to verify claims ATT was making with regarding issues that came up between it and the Union or, more importantly, disprove those claims. With each relevant data request, and analysis of the response to each request, the union became more and more effective at using those responses on behalf of the membership. Indeed, Mr. Hooker's skills were sought by other local unions to assist in dealing with ATT's claims and actions that arguably violated the collective bargaining agreement or safety regulations. (T-351). Of course, each request was viewed dimly by ATT. Not only did the requests make the union a more effective representative, it caused additional work for middle management at ATT at a time when upper management was placing increasingly more responsibility on fewer and fewer members of middle management. Because of this squeeze, the information requests became more and more of an irritation.

Of course, the information alone is of limited use. It is necessary for a union representative or official to understand the meaning of the information to use it effectively to enforce the contract. Brian Hooker became a point person for Local 4034 in challenging actions by the company. Ted Brash found Hooker's demeanor to be "offensive." (T-140). The irritation of middle management finally came to a head after Mr. Hooker testified in another in NLRB case on behalf of this Local concerning a request for information on a safety issue on October 6, 2015 (GC-4). At that point, someone within ATT decided to bring Mr. Hooker's activities to a halt.

Because of the long-term application of the contractual provisions for company paid and Union paid time off, the amount of information Mr. Hooker had to provide to ATT for its portion of his pay was minimal. This is not surprising as over the course of his first few years in this role, his many meetings with management confirmed his active role with the Union. ATT knew he was actively working to enforce the contract as it was on the receiving end of his numerous information requests and vigorous arguments in support of grievances filed under the contract based on that information during grievance and joint union-management meetings.

5. <u>Hooker Forced Return to Work in the Load</u>

Unable to curb his activities in any other way, management decided the best way to keep Mr. Hooker out of their hair was to order him to return to work in the "load." As will be discussed later, to justify this they arrived at a new interpretation of Section 10.08,

Union paid time, that precluded him from being excused full time from the load. If valid, this maneuver would have subjected him to requirement that his Union paid time be subject to the amount of work in the area to which he was assigned—the load. To accomplish this, management had to then create a fictionalized need to perform work in order to keep him in the load, thus reducing the amount of time he would have available to spend working on behalf of the members of the bargaining unit. It also had to reinvent Section 10.08 of the contract.

Starting the day after Hooker testified before the NLRB on October 6, 2015, ATT embarked on a campaign to put him to work in the load as many days a week as they could. He was forced to start retraining (he had been out of the load for 5 years during which many things, including technology, had changed) in late 2015 and was forced to work on his own on January 31, 2016**.** Unfortunately for the employer's campaign, the union was able to maintain Hooker's services for essentially 4 of the 5 days each week.

To this point, and as the employer stated in its opening statement, ATT expected that it would take several months for Mr. Hooker to become proficient again even though he had only been "off" the load since 2010. (T-64). But, as will be discussed in more detail below, regarding the final discipline issued to Mr. Hooker for allegedly not preforming any work on September 20, 2016, Andrew Sharp had to admit that he had not even visited the central office to review the work Mr. Hooker had given to perform or to determine what he had accomplished to resolve the assignment he had been asked to

perform.

At some point, it is clear the employer decided that taking Mr. Hooker away from the Union by placing him in the load was not enough. He was able to continue his work for the union generally 4 days a week, mostly on Union Paid Time. This simply did not accomplish the employer's goal. Mr. Hooker's termination became the new goal.

In the spring of 2016, the company started running Mr. Hooker through the disciplinary process very quickly. It issued untimely discipline often covering several weeks of alleged failures. It is clear that after the discipline issued in May 2016, someone higher up in the company (probably Don Stanley, the long-term Michigan Labor Relations Director, who should have been ATT's main witness on the interpretation of the contract but was not called by the employer to testify on that key issue) became concerned at the obvious violations of the law that were at play. The company backed off for a short time. However, in the Fall of 2016 a full court press was initiated, and Mr. Hooker was quickly discharged.

6. <u>The Contract Issues</u>

Central to this case is ATT's new and unsupportable interpretation of the contract, particularly Sections 10.05 and 10.08. It determined that it was required to only excuse **elected** officials from the load full-time. The employer violated these Sections and discriminated against Mr. Hooker because of his activities on behalf of the bargaining representative. Mr. Hooker's discharge must be set aside on that basis alone.

As the employer noted in its opening statement, the employer promised to establish that it had just cause to discharge Brian Hooker after just 25 days back on the job, but it will fail (T-49). Without that just cause, the employer's actions here clearly violate Section 8 (a) (1), (3) and (5) of the National Labor Relations Act. The employer will not establish just cause under the facts present here.

Counsel for the General Counsel skillfully introduced the evidence that will establish the employer's violations and will thoroughly brief the issues at hand. This brief will concentrate on the flawed re-interpretation of the provisions of the contract that formerly provided for the AA to be excused from the load fulltime. It will also cover a few the improper disciplines that symbolize the employer's clumsy attempt to establish a valid reason for discharging Brian Hooker. At the end of the day, the discrimination of ATT against Brian Hooker in violation of the NLRA because of his work for Local 4034 will be clearly established. No amount of smoke, obfuscation and arm waving will save ATT from its errors.

II. FACTS

A. Contract Provisions at Issue

As a result of the position ATT has taken here, it’s important to note that Article 10 of the collective bargaining agreement has been designed by the parties as covering

"Union Officers **and** Representatives." (page 13 and 15 of G-2, 2015-2018 Agreement Between ATT Midwest and CWA District 4, (hereinafter the "collective bargaining agreement" or "CBA"); emphasis supplied). Article 10 represents the parties' agreement concerning important aspects of their bargaining relationship, including administration of the contract. For example, Section 10.01 provides that ATT will give the Union fourteen calendar days' notice before implementing any plans to either promote or transfer an employee who is a Union Officer. For obvious reasons, the Union wants to be aware of when one of its officers is about to become a member of management.

1. <u>Company Paid Union Time</u>

Section 10.05, under the heading "Payment for Joint Meeting Time," provides for company payment of time spent by Union officials when they "confer" while representing their members who work for ATT. This includes "authorized Union representatives," which, in practice, includes Officers, Administrative Assistants, and stewards.[1]

2. <u>Notice When A Union Representative Will Be Unavailable for Work</u>

Section 10.07 provides for a basic operational necessity—notice to the immediate supervisor when the worker is not available because of a joint meeting. The extent of the notice would necessarily vary depending on whether the Union representative was a part-

[1] There is some recent disagreement as to what is included in "confer" (such as whether an informal pre-grievance meeting to discuss an issue that has arisen but for which a formal grievance has not yet been filed) and how those meetings are conducted (such as in person or over the phone or by other forms of "conferring," such as email exchanges). The Union contends the term "confer" would seem to cover much more than face to face meetings.

time designated Union representative and therefore generally in the "load" and on the work schedule or a full-time designated Union representative and therefore out of the load and not on the work schedule. As Local 4034 President Ryan Letts testified, when Brian Hooker became his full-time Administrative Assistant in 2010, he gave a single notice of that fact to ATT Executive Vice President Cindi Bucks (T-129) and nothing more. Similarly, when Mr. Letts was an administrative assistant, and now as a full-time Union officer, he did not and does not report his availability or unavailability to his current nominal Supervisor, Andrew Sharp (T-91-92). After first being advised of Letts' position with the Union, Sharp simply knew he is not available to work. One and done. There is no dispute that the employer was aware, and had implicitly acknowledged, that Hooker had been unavailable for at least 5 years on a full-time basis, during which he was "excused," just as it was aware of the same for President Letts, Vice President Beach and Security-Treasurer Prince. They were all excused from the load and do not give periodic notice under Section 10.07.

3. <u>Union Paid Time</u>

Section 10.08 is the contractual provision providing for release time for an "Officer **or** properly designated representative of the of the Union." This is "time" that is paid by the Union. This Section appears under the heading "Absence for Union Business." This is for employees who still are considered active employees (both those in the load, such as stewards, and those excused from the load, such as President Letts) of

ATT, but need time off not paid by ATT to perform their duties for the Union.[2]

4. The Changes Applied to AA Hooker To Make Him Less Effective

The goal of the company was to limit Hooker's usefulness to the Union. To do this, they wanted him in the load. The less time he had, the less mischief he could create. The convoluted re-interpretation the company created to accomplish this goal involved invoking the part of 10.08 that implicated work schedules in certain situations. The result of the reinterpretation was that Hooker was not to be excused full time from the workload and instead, going forward, would be subject to certain restrictions. He could only use Union paid time "insofar as work schedules permit." Then ATT would, and did, claim it needed every able-bodied employee available and Hooker could not be spared to the Union.

Unlike those excused from the load fulltime, other employees, such as stewards, who are in the daily load, are understandably subject to contracted limitations on when they can get off the daily schedule and go on Union paid time for purposes such as conducting investigations. As noted, they are limited by the words "insofar as work schedules permit." In 2015, Director Mrla and Supervisor Brash claimed, for the first time ever, that only elected officials were to be excused fulltime from the load under section 10.08. Thus, according to ATT, since he was not an elected union official, the "work schedules" provisions of that Section came into play and when Hooker was

[2] President Letts, Vice President Beach and Secretary Treasurer Prince, and until this dispute AA Hooker, are impacted by this Section, as are the stewards when they are investigating grievances.

ordered to return to the load. ATT now had control over him.

In addition, ATT wanted more detail concerning Mr. Hooker's use of company-paid union time under 10.05. They were apparently angry about the fact that Mr. Hooker, as part of conferring on grievances, may have been using company-paid union time to write the RFI's they found so annoying.

5. The Discipline

The facts concerning the discipline are more logically recited as part of the argument and will be found in that section of this brief.

III. ARGUMENT

A. Does It Make A Difference If He Is Appointed or Elected?

As noted, the change in position the employer made regarding Section 10.08 was denoting who was eligible to be off the load full-time. The company acknowledges that certain union representatives—elected union officers—are entitled under 10.08 "to be excused from the load fulltime" (according to Ted Brash, this was Don Stanley's terminology) (T-1015). But before the Fall of 2015, there is no doubt or dispute that Local 4034's various appointed Administrative Assistants had also been included in those "properly designated representatives of the Union" who were entitled to be excused from the load fulltime under 10.08.

The question before this administrative proceeding is whether the company will carry its burden of establishing that, starting in the Fall of 2015, the contract somehow

was changed and allowed it to treat appointed “properly designated Union representatives” differently than Officers? If ATT cannot carry its burden, then it has violated the contract and committed the unfair labor practices listed in the Second Amended Consolidated Complaint, paragraphs 10 and 11. ATT will not carry its burden. The term “elected” is nowhere to be found in Article 10 and cannot now be added unilaterally by ATT.

B. The Plan

The employer's plan was clever and simple, but ultimately flawed. To control the amount of time Hooker had to prepare information requests, enforce the contract and make the employer toe the line with regard to safety issues, the employer had to challenge his status as a full-time union representative. Since his time was paid for by a combination of company paid time to “confer” under 10.05 and Local 4034 paid Union time under 10.08, the approach had to deal with two different issues.

First, regarding the company-paid union time to confer (Section 10.05), the company had to drastically modify what was within the ambit of "confer." By challenging every action Hooker took that did not involve a face-to-face meeting, they could control how much company paid union time he would be available for. With this new definition, they could simply refuse to meet with him face to face or ensure that occurred only rarely. Given that most supervision was based in other parts of the state, this would be a relatively easy dodge for the company. Hence, going forward, the company demanded that Hooker keep detailed time records of his company paid

"conferring" time and then they could challenge him whenever it did not involve a face-to-face meeting. Perhaps they would even be able to discipline him under the rule against falsifying company records if they could challenge the accuracy of an entry of time.

The union paid time required a bit more creativity. Section 10.08 allowed the union to arrange for the absence of a union representative with the only limitation being that the union would have to pay for the time. Indeed, for several full-time representatives a combination of Union paid time under 10.08 and company paid union time to confer under 10 .05 was sufficient large on a regular basis that they were excused full-time from the schedule. Hooker was one of these before the change.

Section 10.8 has been applied to allow for the absence of a union representative in several instances. As noted, certain elected and appointed officials have been excused full-time from the load between a combination of 10.05 and 10.08. But other union representatives, such as stewards, are on the daily work schedule and, for operational purposes, cannot always be released from work on short notice to go on union-paid time and conduct union business. As a result, the parties negotiated a reasonable limitation. In 10.08, the company agreed to grant reasonable time off "insofar as work schedules permit." In 2015, the company determined it was necessary to apply this to Hooker.

The beauty of this was, if they could make the shoe fit, the company would be in complete control of the application of this limitation. It would be burdensome for the union to challenge the company's claim that the load did not permit the time off has the company has great discretion in determining the need for the particular work to be done

and the date by which it needed to be completed. From the testimony of Mrla and Brash, it was clear there is always work piled up and they simply wait for word from above as to when it will be prioritized. A quick call to San Antonio could nudge some of the work up the priority list, and a directive then would come down proclaiming the need to have all hands-on deck to get it done now. ATT could blow smoke endlessly.

Of course, the clear meaning of the operational limitation in Section 10.08 is that it has to do with individuals who are normally in the load, and not those who were excused full-time from the load, such as Letts and Prince, and Hooker, at least until the Fall of 2015. But that apparently did not bother the company's representatives. They simply declared the need and a window during which the work had to be completed, and then targeted Hooker and only Hooker, apparently as the one person upon whom the future prospects of the company depended. Of all the full-time Union representatives who are off the schedule in District 4, Hooker was the only one whose presence on the load was demanded by the company. But, at the end of his testimony, George Mrla confirmed that workload wasn't the reason they demanded Hooker to be in the load. It was because he had not been elected—

> 13 Q. BY MR. FAYETTE: Well, what I'm trying to understand is,
> 14 is the Company saying it can put him in -- Mr. Hooker in the
> 15 load because he's a non-elected union official, or is the
> 16 Company saying that part doesn't matter, we can put him in if
> 17 we need him?
> 18 I'm trying to figure out what their claim --
> 19 JUDGE SANDRON: I don't think he said that they put him
> 20 in because they needed him. I think he said --

21 THE WITNESS: That had nothing to do with it.

(T-2700).

C. The Contract Does Not Distinguish Between Elected and Appointed

The flaw in the company's position is the wording of Section 10.08 itself. By its own terms, it applies to **any** employee who is "an Officer or properly designated representative of the Union." George Mrla confirmed that Hooker was a properly designated representative of the Union (T-2700). Thus, this section clearly applies to him and the added limitation concerning the needs of the workload does not.

To overcome this problem, the employer set upon a distinction that is simply not to be found in the contract. Mrla and Ted Brash decided that only elected officers were allowed to be off the schedule using a combination of time from 10.05 and 10.08. Their logic was simply that they were unaware of any other individual who was not elected who had been granted "off the load full-time" status other than Brian Hooker. Of course, this ignored 20 years of history regarding Local 4034. More importantly, it ignored the fact that no language in 10.05 or 10.08 implicitly or explicitly describes such a limitation. Each Section clearly applies to Brian Hooker. For purposes of 10.05, there is no doubt that he was an "authorized union representative." For purposes of 10.08, there is no doubt he was "a properly designated representative of the Union." Thus, he clearly qualified to be excused from the schedule. He could be treated no differently than an elected President, Vice President or Secretary-Treasurer, each of whom the company admitted can be off the schedule full-time.

Because on its face Section 10.08 applies to Hooker, it is the burden of the employer to establish some exception to explain their actions. Other than their own reading of the contract, and the fact that other locals have only used this section to have "Officers" off the load, and apparently have simply not sought to have "another properly designated representative of the Union" excused full-time from the load, ATT has nothing. Further, this Local's prior use of Administrative Assistants who were excused from the schedule full-time for at least 20 years, not only stands as an unchallenged past application of these Sections of the contract, but is completely consistent with the words carefully set forth in the contract.

As part of ATT's opening salvo in this dispute, Director Mrla focused on his reading (he was not at the bargaining table) of the contract and his familiarity with other local unions and determined that only officers were entitled release time under Section 10.08. However, Mr. Mrla agreed in his testimony that Mr. Hooker was certainly a designated representative of the Union. That is all that's required. Being elected is not necessary. Indeed, 10.08 specifically deals with that issue. It makes it clear that a properly designated representative of the Union does not necessarily mean an Officer as the term "or" has been placed in the definition. "An Officer or properly designated representative of the Union." Nothing is mentioned about elections.

Further, it would be hard for the company to argue that either Section 10.05 or 10.08 applies only to elected officials. There was no dispute that stewards, who are appointed by the president of the local union, regularly are paid under 10 .05 to attend joint meetings and are given time off under 10.08 that is paid by the Union. Indeed, as

was obvious from the testimony of Ryan Letts that the position of Administrative Assistant was created to assist the stewards in enforcing the collective bargaining agreement. (T-107-109). By being available full-time to study and be familiar with the collective bargaining agreement and to gather information as to its past application and present enforcement, this position would be invaluable to the union. So the employer can find no support for a claim that 10.05 does not allow for an administrative assistant to receive company-paid time.

As to Union paid time under 10.08, the situation is the same. There, the terms "officer" and "properly designated representative of the Union" are on equal footing. This is not unimportant as the company admitted that Michigan Labor Relations Manager Don Stanley advised Ted Brash that elected officers could not be forced into the load. Mr. Brash's testimony was unequivocal. Mr. Stanley strongly advised against pursuing putting elected officers on the schedule. (T-1015). This conclusion by Mr. Stanley, who is mentioned numerous times in the company's testimony but who was not brought forward to testify is a conclusive admission of the application of the contract. Those who are subject to 10.05 and 10.08 are to be excused from the load full-time. So, again, the only issue is whether being elected makes a difference under the contract. Since, as noted above, there is no difference between Mr. Hooker as a designated union representative and an "officer" with regard to the wording of 10.08, the attempt by the employer to create an artificial distinction simply fails.[3]

[3] It is unlikely that the employer could legally require the Union to bargain to require that only elected representatives would be subject to 10.05 and 10.08 as this would interfere with the certified collective bargaining

Nor is there any claim by the company that those on leave under 10.08 could be forced to give notice of the nature of any Union business in which they are participating except in one understandable situation. Under Article 8, collective bargaining procedures, Section 8.02 provides for the reimbursement of travel expenses for attendance at the periodic negotiations for a new collective bargaining agreement and any interim discussions or negotiations between the respected bargaining teams concerning the application of the contract during its term, including serving on the various committees listed in the appendices to the contract. As Mr. Letts noted in his testimony, he gives management notice of such meetings in anticipation of his submission of a request for reimbursement for mileage, travel expenses or lodging. (T-91-92).

D. Discipline

The Counsel for the General Counsel will thoroughly review the facts and arguments concerning the many disciplines issued to Brian Hooker during his handful of days in the load. This brief will address only three to avoid being redundant. In addressing those three, this brief will only make a few points and does not necessarily intend to cover every potential deficiency regarding those disciplines.

E. Manager's Guide Framework For Analyzing Discipline

ATT is to be commended for thoughtfully creating a through guide to assist managers in compiling with the requirements of just cause. The Framework for Analyzing Discipline set forth on page 20 of The Manager's Guide to Corrective Action,

agent's ability to select a representative of its own choosing.

Respondent's Exhibit R-32 ("The Guide") provides a useful checklist to be completed in considering just cause. It mimics Professor and Arbitrator Carroll Daugherty's Seven Tests from Enterprise Wire Co. (46 LA 359, 1966). In expanded form, those tests are:

1. Was the worker given advance warning of the probable consequences of his conduct?

    a. Is the rule or standard that has been violated published?

    b. Is it posted somewhere?

    c. Has the employee received a copy of the rule or performance standard?

    d. Is the rule or standard stated in easy to understand wording

    e. Has the employee been warned previously (coaching or discipline)

2. Was the controlling rule, order or standard reasonably related to efficient and safe operations?

3. Was the alleged violation of the rule or order **fully investigated** before discipline?

    a. Consider a joint investigation with the union

    b. Involves interviewing others, reviewing documents

4. Was the investigation fair and objective?

5. Did the investigation uncover substantial proof of guilt?

6. Was the employer's treatment even-handed and non-discriminatory?

7. Was the disciplinary action reasonable related to the worker's records and the gravity of the offense?

Factors to consider for Both 6 and 7

a. **Seriousness of the infraction**

b. Employee's past coaching, discipline

c. **Employee's length of service**

d. Employee's total performance record

e. Unusual mitigating circumstances

f. How does it compare with what has been done in other similar circumstances; will this employee be receiving the same discipline as others who violated this rule or standard? If not, can you justify why?

g. **Does this employee have the worst record of all employees on violation of this rule, standard?** (Emphasis supplied).

Finally, the Guide, on page 1, directs that the manger partner with their Employee Relations Manager (here, Don Stanley) when acting, even as early as the first occurrence. Given Ted Brash's one year in his current position, this was sage advice, but it was ignored.

Unfortunately, the seven tests were not used in this case. If these requirements are not met, the discipline must be set aside. Here, because Mr. Hooker was discharged for progressive discipline, a failure to establish just cause for each discipline requires that the termination be set aside and any remaining discipline be backed down the progression. Further, it is a fundamental element of just cause that discipline be issued in a timely manner.

If these requirements are not met, the discipline must be set aside. Here, because Mr. Hooker was discharged for progressive discipline, a failure to establish just cause for

each discipline requires that the termination be set aside, and any remaining discipline be backed down the progression.

F. May 9th 2016 Disciplinary Letter for Misuse of Time

1. The Lock Codes

A disciplinary letter was issued to Brian Hooker dated May 9, 2016, but signed by the manager on May 10, 2016, a copy of which is GC Exhibit 27. The disciplinary letter covers two incidents, one on April 10, 2016 concerning the lock code on the tool boxes on his truck and a second, allegedly occurring two weeks later, claiming a misuse of time. A very serious three-day suspension was issued.

Under the contractual requirement of just cause set forth in Section 12.03 on page 17 of the collective bargaining agreement, GC Exhibit 2, and the Seven Tests listed in The Guide, it is the employer's burden to establish not only the facts of the incident but that the seriousness of the incident warranted the punishment provided.

The first notable issue concerning the disciplinary letter is the length of time it took for the company to issue the same. As to the lock issue on April 10, 2016, the immediate supervisor, Sidney Bragg, and his supervisor, Ted Brash, were immediately aware of it as they were involved in the transaction. No further investigation was completed. No explanation was even attempted as to why it took a month to issue discipline.

Discipline is typically issued in a timely fashion. See, for example, Andrew Sharp’s discipline to Dave Lucchese of April 13, 2016. It involved an incident that occurred just

seven days before. (See Respondent's Exhibit 38, page one). The remaining disciplines in that exhibit show a range of 1 to 10 days, with a week being typical. It was not explained why the company's discipline of Brian Hooker, in nearly every case, was so delayed. It would seem the company did not want to give him notice of what ATT considered to be his failure to perform properly. Without that notice, he could not know where he stood with the company—either performance-wise or on the ladder to progressive discipline and discharge. This gave the company the opportunity to let him dig as deep a hole as possible and then spring on him.

As noted, it is a fundamental element of just cause that discipline be issued in a timely manner. Otherwise, the employee is deprived of notice as to the employer's view of his performance and the step at which the employer has placed the employee in progressive discipline. Without that notice, we have the infamous "double secret probation" from the cult classic "Animal House." This delay is simply a violation of the procedural due process necessary to establish just cause.

As to the incident itself, the employer failed to establish the facts to support a claim that Mr. Hooker intentional failed to access to the tools on the truck. Mr. Hooker did not have the code to open the locks and the employer never gave it to him. They gave him a direction that turned out to be faulty. He was advised to use the last 4 digits of the truck number which was painted on the truck. Unfortunately, the supervisor forgot that ATT had added three additional numbers (215, added to the end of all Grand Rapids truck numbers) to the original truck number as part of the identifying number. When Mr. Hooker used those numbers to try to open the lock, he could not. (T-1419). Sidney Bragg

showed up and tried to open them. He could not. He then contacted yet another supervisor and finally was able to open the tool compartments. (T-578). Since he could not get to his tools, Mr. Hooker could not accomplish the task to which he had been assigned. The employer could point to no single thing Hooker did to misuse time. The managers involved simply made unsupported assumptions. Issuing discipline under such circumstances violates every concept of just cause.

Mr. Hooker testified, without contradiction, that it turned out that the lock code was not the last four digits, but the middle 4 digits. Even his supervisor, Sidney Bragg, was unable to open the lock with the last four digits. As noted, he had to contact another supervisor (Sharp) and was eventually able to open the lock. (T-577-582).

Sydney Bragg was not called by the employer to confirm his conversations with Mr. Hooker either in person or over the telephone. All the employer introduced for evidence was Mr. Brash's hearsay testimony. In his testimony, Mr. Brash unreasonably could not understand why Mr. Hooker didn't try any of the other 9999 combinations. (T-1462). Nor could he understand why Mr. Hooker did not just use the lock key to lock the bins. But locking the bins was not the issue. It was opening them. Further, if locking open bins was the issue, there's no evidence that Hooker had a key to access those bins. Indeed, what were the coded padlocks for if the bins already had locks? When Bragg showed up personally, even he couldn't open the locks (one wonders if he was disciplined). He contacted Sharp and was finally able to open the locks. At no time did Bragg indicate that his original instruction to Hooker, to use the last four digits of the truck number,

including the 215, opened the lock.

All in all, there's simply insufficient evidence to show any basis for issuing discipline for Mr. Hooker's inability to unlock the tool bins.

2. Failure to Accomplish Work While Returning to the Garage to Obtain Materials from Another Employee (Misuse of Time)

The second item listed in the disciplinary letter this is similarly untenable. This discipline is a separate incident and in no way related to the April 10 incident, but was simply bundled in the disciplinary letter. It involved a claim the no work had been accomplished on the assigned task. This allegedly occurred on April 24, 2016. Again, discipline was not issued for 16 days. There's simply no excuse for this delay. Is simply too hard for an individual to go back 16 days and reconstruct everything he/she did in order to satisfy management's questions concerning work performed.

This is related to the GPS issues set forth below. The issue with this discipline can be summarized by the person who was watching Mr. Hooker, Jeff Osterberg. The discipline was issued for the period after Mr. Hooker obtained the materials he needed to return to the job and perform the task. (See CG Ex 27). After Hooker obtained those materials, he took his lunch. He also returned to the jobsite. What is at dispute is the exact timing of his securing the materials he needed and the taking of his lunch.

Mr.Osterberg's email of April 25, 2016, to Ted Brash and others, which contained a timeline of what he observed, was admitted as Respondent Exhibit 43a. Osterberg

wrote on page 2, “We have a 30-minute misuse of time.” It allegedly occurred somewhere around the lunch hour. The alleged misuse is predicated on Osterberg's unproven understanding that Hooker had obtained all the materials he needed to return to and complete the job by 11:45 a.m.

Hooker took his 30 minute lunch after he obtained the materials he needed. According to Osterberg, it was a short drive, perhaps 7 minutes, from the shop to the job site. Hooker did not arrive at the job site until 1 pm. Thus, Osterberg calculated that Hooker took 1 hour and 15 minutes (from 11:45 a.m. to 1:00 p.m.) to complete a seven-minute drive and take his half-hour lunch. Thus, he concluded that there was at least a 30-minute misuse of time. (T-2104).

The only problem with this is that Osterberg (1) did not know exactly when Hooker finally obtained all the materials he needed and (2) he did not investigate what Hooker had done after Hooker returned to the jobsite and before Osterberg arrived at 1 p.m.

Some of the materials were to come from another employee, Richard Manguse, who was also on duty that day and who, in a phone call Hooker made to him, committed to meet Hooker at the main garage around noon to give him the items Hooker needed. Osterberg understood he needed to nail this time frame down and noted in his email that it would be necessary to interview Richard Manguse to clarify when Hooker got all of the necessary equipment and materials. (See last paragraph, April 25, 2016 email, Respondent’s Exhibit 43). Management failed to do this. (T-2101 and 2527). As a result,

the employer had no evidence of any misuse of time, only speculation. This failure, in and of itself, negates the possibility of establishing just cause.

This inability to conduct a thorough investigation or, perhaps more accurately, a refusal to conduct a thorough investigation is indicative of the employer's actions here.

3. <u>The GPS Discipline</u>

(a) February 28, 2016

On May 10, 2016 the employer issued a second disciplinary letter, also dated May 9, 2016. (GC-28). This letter was also a very serious three-day suspension letter. It involved a claim that Mr. Hooker had intentionally tampered with the GPS unit on his truck. The alleged tampering occurred on two different occasions. The first time was sometime prior to February 28, 2016. That was the first day he drove his newly assigned vehicle. The GPS never worked after Brian Hooker took over that truck until he reported it on April 17 through a repair order. The employer is assuming that he unhooked it before he ever started the truck. But ATT has no evidence whatsoever that he, in fact, had anything to do with the failure of the GPS to operate. Hooker's uncontradicted testimony was that he didn't know what the device was at the time he first drove the truck. When it fell out, he tossed it into the door pocket.

This was not the first time it had popped out. Caresian Campbell testified that he had Brian's truck prior to February 28, 2016. He also testified that he was contacted by asset protection about the GPS on that truck. He confirmed to asset management that

when he initially got the truck, the GPS was mounted behind the passenger seat. That unit was later removed and new unit was installed under the dash without Mr. Campbell's knowledge. He didn't even see it, let alone know what it was. He related that one day his manager, Sydney Bragg, came up to him and told him that the GPS unit was not tracking. He watched Mr. Bragg reach under the dash and simply reseat the unit in the receptacle (T- 2745). No repairs were required. Thereafter, when he noticed that the light on the unit wasn't working, he would pull it out and plug it back in. Unfortunately, no supervisor similarly instructed Mr. Hooker on what the unit was, how to recognize when it was no longer properly seated in its receptacle or how to reseat it.

The employer may claim that their investigator, Jody Vilk, testified on direct that Caresian Campbell never mentioned any problems with the GPS in her call to him even though she asked him about it. T-1976). In deciding this credibility issue between Vilk and Campbell, it will be important to note that Vilk (1) could not understand why she had no notes of her call to Campbell and, more importantly, (2) corrected that testimony when later asked about her conversation by the Court:

> **16 JUDGE SANDRON: And he confirmed that?**
> **17 THE WITNESS: He confirmed that he did not write the**
> **18 vehicle up for the GPS.** (T-2004).

The write up of which she was speaking, of course, was a repair ticket.

From each witness's testimony, it is clear that these new "plug and play" GPS units were installed after Hooker was excused from the load full-time. The unit he was familiar with was large, cumbersome and located behind the driver seat. It is also

undisputed that the receptacle for the new unit was mounted below the dash, very near to the parking brake. Employees are to instructed to set the brake upon exiting the vehicle by pushing down on the parking brake pedal. Just as importantly, and unlike many passenger cars, the parking brake on this vehicle is released by pushing down on that same pedal. Considering the work boots typically used by individuals who work out in the field, it is not at all unreasonable to suppose that occasionally the act of setting or releasing the parking brake may result in a jolt to the GPS unit that may result in it being partially dislodged from contact with the receptacle. Further jolts, such as driving a heavy truck down the road, could result in the GPS unit falling out on the floor.

This speculation is not just a flight of fancy by the author. Before issuing the discipline, the company was aware that the vendor that operated the GPS units for ATT had emailed a response to a question as to why a unit may not be properly broadcasting. Completely unsolicited, Hermelinda Cespedes advised Andrew Sharp to check whether the unit was properly seated in the "port." She confirmed that the units had popped out in the past due to "driver usage…especially when releasing the parking brake." The email dated April 19, 2016, just two days after the first incident, was copied to Ted Brash. (See second line of CP Ex 2). Even though Sharp claims he forwarded it to Vilk, not surprisingly, it never became a part of Investigator Vilk's report. But she did caution the employer concerning the second incident when she noted in her report that Hooker would have been releasing the brake at the moment the GPS stopped working at 10:19 a.m. on April 24, 2016. (See bottom, page 5, R-41). Why her caution was not heeded was never explained.

The problem of the GPS units popping out due to driver usage can be remedied relatively easily. Indeed, there is a picture of that remedy contained in the Asset Protection Report of Investigation introduced as Respondents Ex 41. Page 36 of 36 shows a representative installation of the GPS unit in a truck of the same model out of the Lansing garage. (This is not the exact truck that Mr. Hooker was assigned.) In testimony, Investigator Vilk confirmed that the GPS unit in the representative vehicle had a plastic zip-tie around it to hold it in place. (T-2013-14) Of course, placing a zip tie around the unit ensures that it cannot be easily kicked loose.

But the real point of this is that the employer will not be able to establish that Mr. Hooker intentionally disconnected the unit on or before February 28, 2016. It will simply not be able to establish the facts it alleges. This discipline must be overturned.

(b) April 24, 2016

The discipline for the second time the GPS unit came loose is even more troubling. According to Jeff Osterberg's email summary of the events on April 24, he was in visual contact with Mr. Hooker beginning at 10:17 a.m. and observed him until well after 10:19 a.m. when Mr. Hooker got in his truck and left the worksite. In testimony, Mr Osterberg confirmed that he saw Mr. Hooker take no action that he interpreted as reaching down and disconnecting the GPS unit. (T-2114 and 2116).

The GPS unit came on momentarily after the vehicle was started. Before moving, Mr. Hooker had to disengage the parking brake. This would have occurred, according to Mr. Osterberg’s report, at 10:19 a.m. The reports that the employer relied upon to claim

that Mr. Hooker intentionally disconnected the GPS shows that the disconnection occurred very soon after the truck started at 10:19 a.m. (T-2119) As Vilk noted in her report, this would have been precisely at the time Mr. Hooker stepped on the parking brake to release it and start his trip back to the garage. Of course, after releasing the brake he would have pulled up his foot to move it over and place it on the floor. The most likely occurrence here is that his boot struck the GPS unit when he lifted his foot off the parking brake pedal. It should not be forgotten that the unit can stop working without falling out on the floor. It can be separated from the connection in the holder enough to not work but still be in place. It can then later fall on the floor while the vehicle is moving.

Despite the fact that the company had a supervisor watching Mr. Hooker at the precise time that the GPS unit stopped broadcasting, and that supervisor saw no suspicious activity on the part of Mr. Hooker, the company came to the conclusion that he again intentionally disengaged it. That conclusion, however, is simply not supported by any evidence. As a result, the employer will not be able to establish just cause for this discipline and it also must be removed from his record. As noted above, as a result of the removal of discipline from the progressive chain, all of subsequent discipline should be backed down and any of the future discipline that he received must similarly be reassessed as part of progressive discipline.

4. <u>Alleged Misuse of Time on September 20, 2016</u>

The last matter this brief will address is the claim by the employer that Hooker performed no work on September 20, 2016. This involved a repair ticket on an F1 line

that didn't have a dial tone. Hooker worked on it for some time and was unable to figure out what was wrong. Hooker returned to the main garage to obtain some additional materials and, while there ran into Caresian Campbell and talked to him about the problem. This action alone demonstrates Hooker's desire to fix the problem. Campbell was then assigned by Andrew Sharp to go back to the jobsite with Hooker and assist in troubleshooting the problem. Sharp thought very highly of Campbell's skills and presumably thought those skills were necessary in this situation. (T-2727 and 2728).

Because of his prior experience, and specific knowledge as to some changes that had occurred in the Central Office, Mr. Campbell was eventually able to diagnose the problem. But. as he explained to the company at the grievance meeting on this discipline, and again explained at the trial in this case, he could easily see how Mr. Hooker would not be able to track down the problem. (T-2728-2735)

Given this unique repair issue and the lack of any testimony that Mr. Hooker did not try to fix the problem, the issuance of discipline for misuse of time is outrageous. It is particularly galling given that management never even visited the work site or did any detailed analysis of the steps Mr. Hooker took to resolve the problem. (T-2515). Andrew Sharp simply noted that he was not able to resolve problem and charged him with misuse of time. This is the antithesis of just cause for discipline. It is unforgivable when it results in discharge.

IV. SUMMARY

On May 10, 2016, after just nine days of working on his own in the load (January 31, February 7, February 14, February 21, March 6, March 28, April 10, April 17 and April 24, 2016; see Respondent's Exhibit 26, pages 13, 14 and 15), ATT placed Mr. Hooker at the final step in progressive discipline for alleged violation of Non-Management Expectations (see page 10 of 20 of The Guide, Respondent's Exhibit 32) and the same final step in progressive discipline for alleged violations of a Code of Business Conduct and Tech Expectations (see GC Exhibit 28). This 20-year employee was on the verge of discharge. But he shouldn't have even been in the workload. He'd been a full-time Union official excused from the full-time workload at ATT for five years. The employer forced him, in violation of years of application of the contract, back into the workload so yet could deal with him on their own terms. Further, the discipline issued was based on incomplete and faulty investigations, and unsupported assumptions. The employer failed to fulfill its promise to establish just cause in each case. None of the disciplines issue during this period, nor the discipline issued concerning his work on September 20, 2016, which resulted in his discharge, where warranted.

The discharge must be overturned, Brian Hooker made whole in all regards, and the company must be made to provide the relief requested by the General Counsel. Nothing less will remedy the employer's attempt here to thwart the Union's representation of its members.

V. CONCLUSION

We respectfully request that the Administrative Law Judge find merit to the unfair labor practice charges and grant the relief requested by the General Counsel.

Dated: May 11, 2018

PINSKY, SMITH, FAYETTE & KENNEDY, LLP
Attorneys for Charging Party CWA 4034

By *<u>/s/ Michael L. Fayette</u>*

Michael L. Fayette (P26107)
Business Address:
146 Monroe Center, N.W., Suite 805
Grand Rapids, MI 49503
(616) 451-8496

CERTIFICATE OF SERVICE

This is a to certify that on May 11, 2018, I filed a copy of the **Brief of the Charging Party Union** with the Regional Director of Region Seven using the Board's E-Filing System, together with a copy of the same on the Counsel for the General Counsel and the Respondent/Employer's counsel of record via email as follows: Steve Carlson (steve.carlson@nlrb.gov), and Stephen J. Sferra (ssferra@littler.com) and Jeffery A. Seidle (jseidle@littler.com).

/s/ Michael L. Fayette
Michael L. Fayette